

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>STACY L. BARNES</b>	)	
Claimant	)	
V.	)	
	)	
<b>KANSAS LEGAL SERVICES, INC.</b>	)	Docket No. 1,072,040
Respondent	)	
AND	)	
	)	
<b>QBE INSURANCE CORPORATION</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant, through Paul V. Dugan, Jr., of Wichita, requests review of Administrative Law Judge Pamela J. Fuller's June 23, 2015 preliminary hearing Order. Anton C. Andersen and Kelsy E. Allison, of Kansas City, appeared for respondent and insurance carrier (respondent).

The record on appeal is the same as that considered by the judge and consists of the January 7, 2015 deposition transcript of claimant and exhibit thereto, the February 27, 2015 deposition transcript of Donald L. James, M.D., and exhibits thereto, the March 11, 2015 deposition transcript of claimant, the Joint Stipulation of Evidence filed May 12, 2015, and all pleadings contained in the administrative file.

**ISSUES**

Claimant alleges she sustained personal injury by accident or injury by repetitive trauma due to sewer gas and mold exposure at respondent's office through June 2, 2014 and every day thereafter. She last worked in said office at the end of September 2014. The judge ruled claimant failed to prove a personal injury or an occupational disease arising out of and in the course of her employment.

Claimant requests the Order be reversed, arguing she met her burden of proof. At a minimum, claimant requests the Board remand this matter back to the judge to order an independent medical examination (IME) to determine causation. Respondent maintains the Order should be affirmed.

The issue for review is: Did claimant sustain a personal injury by accident, repetitive trauma or an occupational disease arising out of and in the course of her employment?

**FINDINGS OF FACT**

Claimant, 47 years old, has been employed by respondent as a social security paralegal since April 2012. Claimant worked in respondent's office in the basement at 100 Military Plaza, Dodge City.

Claimant alleges workplace exposures – breathing in mold spores and sewer gas – caused various injuries, including: hypersensitivity to chemicals/fragrances, nose and throat burning, scratchy throat, stomach pain, nausea, fatigue, insomnia, loss of appetite, forgetfulness, extreme mood swings, irritability, headaches and facial swelling. Claimant testified two of her coworkers had similar symptoms.

The record contains limited medical records. Claimant went to Western Plains Medical Center on March 10, 2013 for headaches or migraines.

On March 12, 2013, claimant saw James Moffitt, M.D., her primary care physician. Claimant complained of headaches for four days. She described the headache as “sudden ‘like an explosion’ sharp” which brought her to tears and doubled her over in pain.<sup>1</sup> Dr. Moffitt recommended Aleve.

On September 19, 2013, claimant called Dr. Moffitt's office complaining of sinus congestion/drainage for the past two to three days, accompanied by a slight cough with phlegm. Dr. Moffitt stated claimant's issues were “likely viral or allergic”<sup>2</sup> and recommended fluids, antihistamines and other cold remedies.

On September 24, 2013, claimant saw Dr. Moffitt for an upper respiratory infection. Claimant complained of sinus pressure in her face and behind her eyes, clogged ears, cough, occasional sinus pressure headache and fatigue for one to two weeks. Dr. Moffitt assessed claimant with acute sinusitis and recommended fluids and over-the-counter cold remedies.

Claimant testified there was a sewer leak in respondent's offices in April 2014. A repairman was called a couple times to fix the leak. Claimant stated the sewer leak caused an odor smelling like rotten eggs and was significant enough they would prop open doors for fresh air to avoid getting sick. A couple of times the employees worked off site because the smell in the office was too strong. While claimant testified she suffered sinus problems during the spring and fall each year, she denied ever being seen by an allergist or having been diagnosed with allergies prior to April 2014.

---

<sup>1</sup> Joint Stipulation (filed May 12, 2015), Moffitt records at 7.

<sup>2</sup> *Id.*, Moffitt records at 50.

Claimant testified that in April 2014, she was sitting at her desk when another employee noticed the left side of her face was swollen. Claimant stated her face was swollen from her forehead down to her neck and from her nose back to her ear.

On April 25, 2014, claimant saw Dr. Moffitt's physician assistant, Rachel Gubbels, for left-sided face and neck swelling. Ms. Gubbels noted "last night as she was falling asleep she said she thought she felt something as in maybe swelling on that side. This morning she woke up with significant swelling from lower eyelid to left ear and down into neck. Swelling has gone down but still visible."<sup>3</sup> This report does not mention a coworker alerting claimant that her face was swollen. Claimant had mild edema on the left side of her face and mild angioedema to the left side of her lip. Ms. Gubbels performed a steroid injection and indicated claimant's swelling was most likely related to an allergic reaction.

In May 2014, mold was discovered above the ceiling tiles on the exterior wall of another employee's office. Claimant's office was at least 28 feet away. Claimant testified she viewed the mold and it appeared black and undisturbed. She did not touch the mold and did not believe there was any mold within the duct work. Claimant never saw mold anywhere else in the office building. Claimant later testified she did not remember seeing the mold, but recalled being shown the area the mold was located.<sup>4</sup>

Claimant testified that she was told by another employee in May 2014 that the left side of her face was swollen. Claimant testified the swelling usually lasted about four hours. She did not take any photographs of the swelling.

On May 20, 2014, claimant presented to Ms. Gubbels with facial swelling. The medical record states claimant reported picking up doughnuts when it started and claimant suspected workplace mold exposure. Ms. Gubbels observed moderate swelling of claimant's left lip and her left neck was swollen. Ms. Gubbels assessed left angioedema, prescribed prednisone and suggested an allergist consult if her swelling continued.

According to claimant, she began experiencing burning in her nose and throat while at work in May 2014. She denied having stomach pain and nausea before May 2014, except for occasional nausea when she was sick with a cold or flu. Her fatigue started in April or May 2014. If she sat down after coming home, she would fall asleep for several hours. While she testified doing so was "very unusual,"<sup>5</sup> she did not seek medical treatment. She denied being fatigued or feeling lethargic prior to May 2014. Her insomnia and loss of appetite also began in May 2014.

---

<sup>3</sup> *Id.*, Moffitt records at 17.

<sup>4</sup> Claimant Depo. (Mar. 11, 2015) at 14.

<sup>5</sup> Claimant Depo. (Jan. 7, 2015) at 71.

Claimant testified that subsequent to May 2014, she has episodes when she forgets where she is supposed to be and has been told she repeats conversations, but has no recollection. While she had occasional mood swings associated with her monthly cycle before May 2014, her current mood swings are extreme, occur nowhere near her cycle, and are associated with irritability.

Claimant testified while she had headaches before, she noticed after May 2014, the headaches came on instantly whenever she was in close proximity to the workplace computer server and her headaches would last hours. The headaches were concentrated in the front of her head above her eyebrows. She did not take any medication for her headaches.

According to claimant, three tests for mold were conducted on respondent's office. The first was requested by the landlord, with the second and third performed at the request of respondent.<sup>6</sup>

EMLab P & K performed a spore trap analysis at respondent's office on May 28, 2014. Their testing showed the outside spore count was 2,200 m<sup>3</sup> (per cubic meter) and 27 m<sup>3</sup> inside respondent's offices.

An investigator for Terracon performed a mold assessment at respondent's office on June 23, 2014. The reception area had visible water damage on ceiling panels from a leaking air conditioning unit. There was a two foot by two foot area of mold growth inside the air conditioner. The plenum space above another worker's office showed signs of prior water damage and discoloration and rusting on pipes. Test results showed spore or fungi count of 347 m<sup>3</sup> in the reception area, 170 m<sup>3</sup> in claimant's office, 127 m<sup>3</sup> in another office and 147 m<sup>3</sup> in another office, but at 52,850 m<sup>3</sup> outside. Lab testing suggested an outdoor source for spores, rather than spores released from indoor fungal growth, even though there was visible fungal growth indoors. Terracon suggested the leak be repaired and the air conditioner be replaced or the mold growth remediated.

Claimant testified after they found mold in the reception area, respondent's office was moved to the second floor at 100 Military Plaza, Dodge City, where she worked until the end of September 2014. While her symptoms showed some improvement after she was on the second floor, they never went away. At least two times a week until the end of July, claimant would return to the basement to get supplies and use the copy machine. Thereafter, she returned to the basement on only two occasions in September. She testified that whenever she went to the basement, she experienced nose and throat burning. She also experienced nose and throat burning at respondent's new office when exposed to computers that had been cleaned and brought over from the old office. Claimant testified her headaches continued until the server was replaced after moving to their new office. Claimant stated her condition does not affect her ability to do her job.

---

<sup>6</sup> The third test was not placed into evidence.

Claimant treats with Donald James, M.D., an ear, nose and throat physician who is board certified in allergies with an emphasis on allergy and immunology. She has seen Dr. James on three occasions. Claimant was referred to Dr. James by two coworkers who are also making workers compensation claims for sewer gas and mold exposure.

Dr. James first evaluated claimant on December 16, 2014. He took a medical history. Claimant informed him about her workplace exposure to mold. She complained of a sore throat, burning eyes and nose, digestive problems, lack of appetite, constipation, mood swings, headaches, lethargy, insomnia and chronic sinus problems, including seasonal allergies that worsened. Dr. James' physical examination revealed a dry and flaky ear canal, a slight deviated septum, boggy and thick mucoid turbinates and tongue swelling. Dr. James assessed chronic sinusitis, allergies, insomnia and gastrointestinal dysfunction. Dr. James put claimant on a lubricator decongestant with an antifungal to treat mold sensitivity. Claimant indicated May 12, 2014 was when her symptoms began. Claimant reported doing better on December 30, 2014, after having been on the medication Dr. James prescribed.

On January 15, 2015, Dr. James noted claimant's boggy nasal and oral mucus membranes were improved. The doctor obtained an inhalant panel which showed claimant had a very low positive to *Rhizopus nigricans*, but was negative to all other tested molds. Dr. James did not know if such specific mold was in respondent's office. The inhalant test was positive for cat dander. Claimant has two cats.

Dr. James opined claimant had an immune environmental overload of some sort based on allergies to inhalants or molds and foods. Dr. James believed there was a causal connection between claimant's medical condition and her work environment based upon her history of significant symptoms in April or May 2014, the fact that she improved when away from the environment and that she responded well to an antifungal. Dr. James opined the prevailing factor for claimant's condition was overexposure in the workplace.

Dr. James testified claimant's exposure to sewer gas during the same time period overwhelmed her immune system, causing her to react. Dr. James' recommended course of treatment was for claimant to stay away from allergens, treat any symptoms that arise and build up her immune system. His only restriction would be for claimant to stay out of the environment that is causing the problem.

On cross-examination, Dr. James admitted the natural aging process causes more sensitivity and menopause is another stress on the immune system. Dr. James believed claimant's mold exposure was a triggering factor in the overburdening of her immune system because of her response to anti-mold medication and the fact that she did better when she took mold out of her diet, such as bread and cheese. The doctor acknowledged not reviewing claimant's prior medical records. Dr. James did not know what type or concentration of mold to which claimant may have been exposed. He acknowledged mold is everywhere claimant might walk.

Claimant testified Dr. James' treatment has helped. She has not had nausea or eye burning and her headaches and itching have gone away. She testified she last had nausea at the 100 Military Plaza address. She still, however, has nose burning, insomnia almost daily, loss of appetite, forgetfulness and mood swings. She complained her nose would burn in the grocery store detergent aisle, the Walmart beauty section or at the courthouse. However, she has not noticed hypersensitivity to scents since July 2014.

Allen J. Parmet, M.D., who is board certified in occupational medicine and aerospace medicine and a fellow of the American College of Preventative Medicine, reviewed claimant's medical records at respondent's request, but did not interview or examine claimant. Dr. Parmet reviewed the two air sample reports and claimant's testimony. Dr. Parmet had no medical diagnosis for claimant and indicated her complaints may be attributable to psychological stressors. Dr. Parmet stated there was no occupational basis for claimant's complaints based on the studies showing higher mold exposure outside claimant's workplace and no significant level of mold in her workplace.

Dr. Parmet downplayed what he said was Dr. James' reliance on views espoused by The Environmental Center of Dallas, which Dr. Parmet indicated were not supported by mainstream science or medicine. To the contrary, Dr. Parmet indicated the American College of Occupational and Environmental Medicine and the National Academy Institute of Medicine indicated human health is not adversely affected by inhaled mycotoxins in the home, school or office and a causal connection is "weak and unproven."<sup>7</sup> The doctor indicated claimant's work as a paralegal placed her at no greater risk for mold exposure than any other worker or person who lives inside and outside workers face a greater risk.

Page eight of the judge's Order stated, in part:

After review of all the evidence presented, it is found that the claimant did not meet with personal injury arising out of and in the course of her employment, nor did she acquire an occupational disease. The claimant has failed to meet her burden of proof. She has failed to prove that any condition she is suffering from resulted from exposure to mold in her work environment. Dr. James didn't know the type of mold the claimant was exposed to. He could not say what specific mold is causing her symptoms. Further, that aging can increase a person's sensitivity. Dr. James admitted that he made an assumption that the claimant was exposed to mold that is overloading her immune system. The industrial hygiene samples from both sources clearly indicate that there is no significant level of mold exposure in the workplace. Dr. Parmet said the occupation of a legal secretary does not create any hazard and the trace presence of mold spores in the office at a level lower than outside air does not constitute an occupational hazard or any special risk of acquiring a disease.

---

<sup>7</sup> Joint Stipulation (filed May 12, 2015), Parmet report at 9.

**PRINCIPLES OF LAW**

An employer is liable to pay compensation to an employee incurring personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment. Claimant must prove her right to an award based on the whole record using a “more probably true than not true” standard.<sup>8</sup>

K.S.A. 2013 Supp. 44-508 states in part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

K.S.A. 2013 Supp. 44-5a01(b) provides in relevant part:

(b) "Occupational disease" shall mean only a disease arising out of and in the course of the employment resulting from the nature of the employment in which the employee was engaged under such employer, and which was actually contracted while so engaged. "Nature of the employment" shall mean, for purposes of this section, that to the occupation, trade or employment in which the employee was engaged, there is attached a particular and peculiar hazard of such disease which distinguishes the employment from other occupations and employments, and which creates a hazard of such disease which is in excess of the hazard of such disease in general. The disease must appear to have had its origin in a special risk of such disease connected with the particular type of employment and to have resulted from that source as a reasonable consequence of the risk. Ordinary diseases of life and conditions to which the general public is or may be exposed to outside of the particular employment, and hazards of diseases and conditions attending employment in general, shall not be compensable as occupational diseases . . . .

---

<sup>8</sup> K.S.A. 2013 Supp. 44-501b(c) and K.S.A. 2013 Supp. 44-508(h).

**ANALYSIS**

In this Board Member's opinion, a number of claimant's symptoms seem nebulous and subjective. Neither medical opinion is very helpful in determining causation. The diametrically-opposed competing experts seem to have "all or nothing" opinions. Dr. Parmet only did a records review; he did not evaluate claimant and he did not address the impact of sewer gas exposure. Dr. James' opinion is largely based on claimant saying she was exposed to mold and her belief that her symptoms were due to mold exposure. Dr. James did not review any of claimant's medical records, but Dr. Parmet did. A court-ordered and neutral independent medical evaluation might be prudent, but that is within the judge's discretion.

While this is a close and difficult case, after carefully considering all of the evidence, this Board Member finds claimant did not prove a compensable claim by a preponderance of the evidence.

**CONCLUSIONS**

Claimant did not prove a compensable personal injury by accident, injury by repetitive trauma or occupational disease.

**WHEREFORE**, the undersigned Board Member affirms the June 23, 2015 preliminary hearing Order.<sup>9</sup>

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of August, 2015.

\_\_\_\_\_  
HONORABLE JOHN F. CARPINELLI  
BOARD MEMBER

---

<sup>9</sup> By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(I)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.



c: Paul V. Dugan, Jr.  
nancy@dgwichitalaw.com

Anton C. Andersen  
mvpkc@mvplaw.com  
aandersen@mvplaw.com  
tladd@mvplawcom

Kelsy E. Allison  
kallison@mvplaw.com

Honorable Pamela J. Fuller